

COMMITTEE FOR PUBLIC COUNSEL SERVICES

PERFORMANCE STANDARDS

GOVERNING THE REPRESENTATION OF INDIGENT PERSONS IN AUTHORITY TO TREAT ("SUBSTITUTED JUDGMENT") CASES

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c. 211D. Counsel assigned pursuant to G.L. c. 211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

These standards describe the steps which should be taken by an attorney who has been assigned to represent a client in the Probate Court Department or in the District Court Department in which the petitioner is requesting the authority to administer extraordinary medical treatment to the client. Counsel is assigned to represent persons in these cases pursuant to *Rogers v. Commissioner of the Department of Mental Health*, 390 Mass. 489 (1983), and *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728 (1977). [See also *CPCS Performance Standards for Commitment Proceedings*.]

1. The role of counsel in these cases is to be an advocate for the client, in opposition to the petition and to insure that the client is afforded all of his or her due process and other rights.
2. Immediately upon receipt of the assignment of the case the attorney shall (a) file an appearance in court; (b) notify petitioner's counsel of the assignment; (c) obtain a copy of the petition, the medical certificate, and any affidavits or other documents that were filed with the petition; (d) inform the client of the assignment (if the attorney is unable to meet with the client and to promptly begin working on the case, or if the attorney is unable to appear in court on the assigned date, he or she shall decline the appointment); (e) the attorney should not agree to a continuance of the case without first consulting with the client and obtaining his or her consent.
3. The attorney shall meet with the client as soon as possible, but in no event later than 48 hours prior to hearing. At this meeting the attorney shall, at a minimum, explain to the client his or her right to make his or her own decisions regarding treatment, and ascertain the client's wishes. The attorney shall explain his or her role, the law, determine the client's version of the facts, and the client's wishes. While not required, the attorney should seek to obtain from the client written authorization to examine the client's medical record or, where the client is unable or unwilling to provide such authorization, a court order authorizing such examination. Finally, the attorney shall discuss the possibility of an independent evaluation. See G.L. c. 261, § 27c(4) and *Guardianship of a Mentally Ill Person*, Mass.App.Ct., No. 85-0018 Civ. (Dreben, J.).
4. If the attorney believes an independent examination will aid the client, and the client agrees to such an evaluation, the attorney shall file a motion for funds for an independent examination by a clinician of the client's choosing and at the Commonwealth's expense. The client should be advised that such an examination will take time and may cause delay in hearing of the case.
5. The attorney shall contact the independent clinician if a motion for funds is allowed. The attorney shall remind the doctor that his or her report is the property of the client and should be sent to the attorney, and not be filed with the court or disclosed to the petitioner's attorney, without the permission of the client's

attorney. The attorney should remind the doctor that the purpose of the examination is to evaluate the client's competence to make the decision regarding extraordinary medical treatment and, if appropriate, the client's substituted judgment.

6. The attorney shall thoroughly investigate the facts. This investigation shall include at a minimum (a) a review of the physician's certificate, or the clinical team report, filed with the petition and the medical affidavit; (b) a review of (i) hospital records, including medication history, (ii) Treatment Review Notes, including diagnoses, treatment history, and comments regarding the competence of the client, (iii) Unit and Nursing Notes, for the client's relationship with staff and degree of cooperation with treatment programs, and (iv) the client's Individual Service Plan; (c) an interview of hospital staff, including doctors, nurses, and social workers, staff of other programs and other persons familiar with the client, and friends and family of the client.

7. The attorney shall use formal discovery mechanisms if indicated and tactically advisable. The attorney shall confer with the petitioner personally, or through counsel, whichever is appropriate, to determine the petitioner's reason for requesting the authorization to treat. The attorney shall confer with potential witnesses, including treating psychiatrists or psychologists, nursing and any other relevant staff, the prospective guardian, if any, and other possible witnesses suggested by the client. The attorney should also confer with other involved parties, for example, family members. Where necessary, witnesses should be subpoenaed. The attorney should meet with the witnesses in advance of the trial in order to prepare them for direct- and cross-examination. The attorney shall review the medical record to identify those parts of the record which should not be admitted into evidence. The attorney should identify the petitioner's witnesses and make an effort, if tactically indicated, to interview them on the record and prepare cross-examination.

8. The attorney should meet again with the client to discuss the upcoming hearing, and should keep him or her informed of the progress of case preparation. The attorney shall inform the client of the witnesses expected to be called and any other evidence he or she intends to present. The attorney should also discuss with the client the desirability of the client testifying. If the client wishes to testify, the attorney should thoroughly prepare the client for direct- and cross-examination.

9. The attorney should establish a record of the client's history in the following areas: (a) history of treatment with proposed treatment, if any, including side effects; (b) pattern of participation in inpatient and outpatient treatment; (c) relative success of previous treatment plans; (d) current treatment plan; (e) school record; (f) criminal record; (g) employment record; (h) home situation, and (i) religious belief.

10. After reviewing the petition and the medical record the attorney shall determine if any procedural defenses can be raised, and file appropriate motions with supporting memoranda (e.g., if the petition fails to set forth sufficient facts in support of the petition).

11. Prior to the hearing the attorney shall (a) prepare requests for findings of fact and law to be presented at the close of evidence; (b) prepare any pretrial motions, memoranda, and requests for rulings; (c) prepare consistent direct- and cross-examination questions; (d) prepare arguments to the judge.

12. During the hearing the attorney shall act as a zealous advocate for the client, insuring that proper procedures are followed and that the client's interests are well represented.

13. After the hearing the attorney shall meet with the client to explain the court's decision. The attorney shall ensure that periodic reviews and an expiration date are incorporated into the court's decree, as well as provision for modifying the decree if the client's condition changes. See *Guardianship of Weedon*, 409 Mass. 196 (1991). The attorney shall continue to represent the client for purposes of periodic reviews.

14. If appropriate, the attorney shall assist the client in filing an appeal. (Where an appeal is filed, the attorney shall, without delay, notify CPCS's Mental Health Litigation Unit in order that appellate counsel may be assigned.)